



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KITALE**

**CIVIL CASE NO. 85 OF 2015**

**JOHN AGUILINDA ARADI:.....PLAINTIFF**

**VERSUS**

**FESTO WAKHUNGU ZEPHANIA.....DEFENDANT**

**RULING**

1. When this matter came up for mention this morning, the plaintiff/Applicant's advocate made an application seeking to withdraw a notice of motion dated 15.6.2015. The application was made because the plaintiff/applicant had filed another application dated 7.10.2015 seeking to amend the plaint.
2. The application for withdrawal of motion dated 15.6.2015 was opposed by the defendant/respondent's lawyer on the ground that the application which is sought to be withdrawn had been compromised by a consent recorded on 2.7.2015 and that therefor it cannot be legally withdrawn.
3. In response to the defendant/Respondent's submissions, the plaintiff/applicant's advocate argued that the consent was made specifically for purposes of the application and that since the plaintiff is no longer interested in the survey which was required, there is no point of going on with the application. The advocate further argued that the plaintiff/applicant cannot be forced to urge on an application he is not willing to proceed with.
4. I have considered the application as well as the opposition thereto by the defendant/Respondent's advocate. The consent which was recorded on 2.7.2015 was asking surveys to visit parcel Nos. Kitale Municipality Block 17/Bidii 230 and 20 0and ascertain whether there existed an access road between the two properties. The plaintiff/Applicant was clear that the report was required before the application dated 15.6.2015 could be heard.
5. There are now new developments in that the plaintiff/Applicant is doing away with the issue of pursuing the access road but now wants a surveyor sent to the ground to determine the acreages of the two parcels. I have looked at the notice of motion dated 7.10.2015 together with the proposed amendment to the point. The proposed amended plaint has rendered the motion of 15.6.2015 superfluous. This is because the plaintiff's claim has completely changed from that of determination of whether there is an access road in between the two plots to that of whether there is encroachment. It will therefore be unnecessary to pursue a line which will be discharged once the amendment is allowed. It is the need to amend the plaintiff's claim which necessitated the application for withdrawal. I therefore find that the application for withdrawal of notice of motion dated 15.6.2015 is justifiable in the circumstances. I allow the plaintiff to withdraw the motion dated 15.6.2015 with costs to the defendant/Respondent.

It is so ordered.

Dated , signed and delivered at Kitale on this 22nd day of October,2015.

**E. OBAGA**

**JUDGE.**

In the presence of M/S Arunga for Plaintiff.

Court Assistant - Winnie.

**E. OBAGA**

**JUDGE**

22/10/15